

<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

OWCP properly determined that appellant was at fault in the creation of the overpayment, thereby precluding waiver of recovery of the overpayment.

### **FACTUAL HISTORY**

On May 28, 2016 appellant, then a 36-year-old senior officer, filed a traumatic injury claim (Form CA-1) alleging that on that day he twisted (hyperextended) his left knee when he missed a step as he walked down a staircase while in the performance of duty. He stopped work on that day. On August 1, 2016 OWCP accepted the claim for sprain of other specified parts of the left knee and chondromalacia patellae of the left knee.<sup>2</sup> It paid appellant wage-loss compensation on the periodic rolls, as of August 7, 2016.

In a September 7, 2016 letter, Form CA-1049, OWCP outlined appellant's entitlement to compensation benefits. An attached Form EN1049 instructed that, if he worked during any portion of the covered period, and compensation payments were received *via* either paper check or for payments sent by electronic funds transfer (EFT), he was to return the payment to OWCP even if he had already advised OWCP that he was working. OWCP noted that appellant was expected to monitor his EFT deposits carefully, at least every two weeks.

In a January 3, 2019 medical report and January 7, 2019 work capacity evaluation (Form OWCP-5c), Dr. J. David DeLapp, an attending Board-certified orthopedic surgeon, released appellant to full-time regular-duty work with no restrictions as of January 7, 2019.

In a January 22, 2019 telephone memorandum (Form CA-110), appellant informed OWCP that he had returned to work on January 4, 2019.

On February 2, 2019 the EFT for the period January 7 through February 2, 2019 was deposited into appellant's account.

The employing establishment, in a February 28, 2019 letter, advised OWCP that appellant had returned to full-duty work effective January 7, 2019.

By letter dated April 4, 2019, OWCP advised appellant of its preliminary determination that he had received an overpayment of compensation in the amount of \$3,228.20 because he received wage-loss compensation for TTD for the period January 7 through February 2, 2019 after he had returned to full-time work. It found that he received wage-loss compensation for TTD in the net amount of \$3,347.76 for the period January 7 through February 2, 2019. OWCP divided \$3,347.76 by a 28-day OWCP pay cycle and multiplied by 27 days (January 7 through February 2, 2019), which yielded a total overpayment in the amount of \$3,228.20. It also made a preliminary finding that appellant was at fault in the creation of the overpayment because he had accepted payments that he knew, or reasonably should have known, to be incorrect. OWCP explained that over 30 days had elapsed since the EFT deposit was made, which allowed him ample time to receive and review a statement from his financial institution which showed the details of the

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<sup>2</sup> By decision dated August 16, 2017, OWCP granted appellant a schedule award for five percent permanent impairment of the left leg. The period of the award ran for 14.4 weeks from February 7 to May 18, 2017. OWCP, by decision dated June 3, 2019, denied appellant's claim for an increased schedule award.

improper payment. It advised appellant that he could submit evidence challenging the fact, amount, or finding of fault, and request waiver of recovery of the overpayment. OWCP requested that he complete an enclosed overpayment recovery questionnaire (Form OWCP-20) and submit supporting financial documentation. Additionally, it notified appellant that, within 30 days of the date of the letter, he could request a telephone conference, a final decision based on the written evidence, or a prerecoupment hearing.

On April 12, 2019 appellant requested a prerecoupment hearing before a representative of OWCP's Branch of Hearings and Review. He did not dispute the fact and amount of the overpayment, but indicated that the overpayment occurred through no fault of his own and requested a waiver. Appellant asserted that he called OWCP to ask whether he would receive another compensation check and was told "yes." He also asked whether his payment was an overpayment and was told "no." Appellant indicated that he assumed OWCP was late in sending his compensation payment. No additional information was received.

By decision dated September 6, 2019, an OWCP hearing representative finalized the preliminary overpayment determination indicating that appellant had received an overpayment of compensation in the amount of \$3,228.20 for the period January 7 through February 2, 2019.<sup>3</sup> He determined that appellant was at fault in the creation of the overpayment and, therefore, appellant was not entitled to waiver of recovery of the overpayment. The hearing representative ordered that appellant should repay the overpayment in its entirety.

### **LEGAL PRECEDENT -- ISSUE 1**

Section 8102(a) of FECA provides that the United States shall pay compensation for the disability or death of an employee resulting from personal injury sustained while in the performance of his or her duty.<sup>4</sup> Section 8129(a) of FECA provides, in pertinent part, that when an overpayment has been made to an individual under this subchapter because of an error of fact or law, adjustment shall be made under regulations prescribed by the Secretary of Labor by decreasing later payments to which an individual is entitled.<sup>5</sup>

Section 8116(a) of FECA provides that, while an employee is receiving compensation or if he or she has been paid a lump sum in commutation of installment payments until the expiration of the period during which the installment payments would have continued, the employee may not receive salary, pay, or remuneration of any type from the United States, except in limited specified instances.<sup>6</sup> Section 10.500 of OWCP's regulations provides that compensation for wage loss due to disability is available only for periods during which an employee's work-related medical

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<sup>3</sup> In the September 6, 2019 decision, OWCP's hearing representative noted that appellant did not attend the scheduled telephonic prerecoupment hearing on July 31, 2019 and, thus, appellant abandoned his hearing request. He converted appellant's request to a review of the written record.

<sup>4</sup> 5 U.S.C. § 8102(a).

<sup>5</sup> *Id.* at § 8129(a).

<sup>6</sup> *Id.* at § 8116(a).

condition prevents him or her from earning the wages earned before the work-related injury.<sup>7</sup> A claimant is not entitled to receive TTD benefits and actual earnings for the same time period.<sup>8</sup> OWCP's procedures provide that an overpayment of compensation is created when a claimant returns to work, but continues to receive wage-loss compensation for TTD.<sup>9</sup>

### **ANALYSIS -- ISSUE 1**

The Board finds that appellant received an overpayment of compensation in the amount of \$3,228.20 for the period January 7 through February 2, 2019 because he had returned to full-time regular-duty work on January 7, 2019, but continued to receive wage-loss compensation for TTD through February 2, 2019.

The Board finds that the evidence of record establishes that appellant returned to full-time regular-duty work for the employing establishment effective January 7, 2019, but continued to receive full wage-loss compensation through February 2, 2019. As noted above, a claimant is not entitled to receive wage-loss compensation benefits for TTD and actual earnings for the same time period.<sup>10</sup> Therefore, an overpayment of compensation was created in this case.

With regard to the amount of overpayment, the Board finds that OWCP properly calculated appellant's compensation paid for the period January 7 through February 2, 2019. The record contains no evidence contradicting fact or amount of the overpayment. Thus, the Board finds that appellant received an overpayment of compensation in the amount of \$3,228.20 for the period January 7 through February 2, 2019.

### **LEGAL PRECEDENT -- ISSUE 2**

5 U.S.C. § 8129(b) provides: "Adjustment or recovery by the United States may not be made when incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of FECA or would be against equity and good conscience."<sup>11</sup> A claimant who is at fault in the creation of the overpayment is not entitled to waiver.<sup>12</sup> On the issue of fault 20 C.F.R. § 10.433(a) provides that an individual will be found at fault if he or she has done any of the following: (1) made an incorrect statement as to a material fact which he or she knew or should have known to be incorrect; (2) failed to provide information

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<sup>7</sup> 20 C.F.R. § 10.500(a).

<sup>8</sup> See *L.T.*, Docket No. 19-1389 (issued March 27, 2020); *C.H.*, Docket No. 19-1470 (issued January 24, 2020); *L.S.*, 59 ECAB 350, 352-53 (2008).

<sup>9</sup> *L.T.*, *id.*; *C.H.*, *id.*; Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Identifying and Calculating an Overpayment*, Chapter 6.200.1(a) (September 2018).

<sup>10</sup> See *supra* notes 6-9.

<sup>11</sup> 5 U.S.C. § 8129(b).

<sup>12</sup> *R.G.*, Docket No. 18-1251 (issued November 26, 2019); *C.Y.*, Docket No. 18-0263 (issued September 14, 2018).

which he or she knew or should have known to be material; or (3) accepted a payment which he or she knew or should have known was incorrect.<sup>13</sup>

Section 10.433(b) of OWCP's regulations provides that whether or not an individual was at fault with respect to the creation of an overpayment depends on the circumstances surrounding the overpayment. The degree of care expected may vary with the complexity of those circumstances and the individual's capacity to realize that he or she is being overpaid.<sup>14</sup>

### **ANALYSIS -- ISSUE 2**

The Board finds that appellant was not at fault in the creation of the overpayment.

In cases where a claimant receives compensation through direct deposit, the Board has held that OWCP must establish that, at the time a claimant received the direct deposit in question, he knew or should have known that the payment was incorrect.<sup>15</sup> The Board has held that an employee who receives payments from OWCP in the form of a direct deposit is not at fault for the first incorrect deposit into his or her account since the acceptance of the overpayment, at the time of receipt of the direct deposit, lacks the requisite knowledge.<sup>16</sup> Because fault is defined by what the claimant knew or should have known at the time of acceptance, one of the consequences of EFTs is that the claimant lacks the requisite knowledge at the time of the first incorrect payment.<sup>17</sup> Whether or not OWCP determines that an individual is at fault with respect to the creation of an overpayment depends on the circumstances surrounding the overpayment.<sup>18</sup>

OWCP paid appellant compensation by direct deposit every 28 days. Appellant returned to full-time work on January 7, 2019. The first direct deposit he received after his return to work was made on February 2, 2019 and included compensation for the period January 7 through February 2, 2019. There is no evidence to demonstrate that he had clear knowledge at the time the bank received the February 2, 2019 direct deposit that the payment was incorrect.<sup>19</sup> Therefore, the Board finds that at the time of the improper direct deposit was made, appellant had no knowledge that it was incorrect. Appellant, therefore, cannot be found to be at fault in the acceptance of the February 2, 2019 direct deposit. The case must, therefore, be remanded to OWCP for a *de novo*

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<sup>13</sup> 20 C.F.R. § 10.433(a).

<sup>14</sup> *Id.* at § 10.433(b); *see also R.G.*, *supra* note 12; *D.M.*, Docket No. 17-0983 (issued August 3, 2018).

<sup>15</sup> *See C.H.*, Docket No. 19-1470 (issued January 24, 2020); *see also Claude T. Green*, 42 ECAB 174, 278 (1990).

<sup>16</sup> *C.H.*, *id.*; *Tammy Craven*, 57 ECAB 589 (2006).

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *See B.W.*, Docket No. 19-0239 (issued September 18, 2020); *K.P.*, Docket No. 19-1151 (issued March 18, 2020); *C.Y.*, *supra* note 12; *see also M.M.*, Docket No. 15-0265 (issued May 27, 2015); *Danny E. Haley*, 56 ECAB 393 (2005); Federal (FECA) Procedure Manual, *supra* note 9.

decision to determine whether he is entitled to waiver of recovery of the overpayment in the amount of \$3,228.20 made on February 2, 2019.<sup>20</sup>

### **CONCLUSION**

The Board finds that appellant received an overpayment of compensation in the amount of \$3,228.20 for the period January 7 through February 2, 2019 because he had returned to full-time regular-duty work on January 7, 2019, but continued to receive wage-loss compensation for TTD through February 2, 2019. The Board further finds that OWCP improperly determined that appellant was at fault in the creation of the overpayment.

### **ORDER**

**IT IS HEREBY ORDERED THAT** the September 6, 2019 decision of the Office of Workers' Compensation Programs is affirmed in part and reversed in part. The case is remanded for further proceedings consistent with this decision of the Board.

Issued: December 21, 2020  
Washington, DC

Alec J. Koromilas, Chief Judge  
Employees' Compensation Appeals Board

Janice B. Askin, Judge  
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge  
Employees' Compensation Appeals Board

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<sup>20</sup> *B.W., id.; K.P., id.; B.R.*, Docket No. 18-0339 (issued January 24, 2019).